

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-SAJ
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO DISMISS
COUNT 6 OF SECOND AMENDED COMPLAINT**

I. INTRODUCTION

Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., George’s, Inc., George’s Farms, Inc., Peterson Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Willow Brook Foods, Inc., Simmons Foods, Inc., Cal-Maine Farms, Inc. and Cal-Maine Foods, Inc. (“Defendants”) submit the following reply in support of their Motion to Dismiss Count 6 of Plaintiffs’ Second Amended Complaint.

II. ARGUMENT

Plaintiffs argue that their trespass claim should not be dismissed because all definite streams in the Oklahoma portion of the Illinois River Watershed (“IRW”) are owned by the State of Oklahoma and that their bare allegation of ownership provides the requisite possessory interest for a trespass claim. *See generally*, Response to Defendants’ Motion to Dismiss Count 6 of Second Amended Complaint (“Pls.’ Resp.”). Plaintiffs also claim that the Second Amended Complaint’s (“SAC”) generic references to “all definite streams” satisfies Rule 12 and this Court’s prior instructions. Plaintiffs’ arguments fail to rescue their trespass claim, which this

Court already dismissed once. Plaintiffs have plead no facts to support their conclusory claim that they have a possessory interest sufficient to support a trespass claim. Additionally, Plaintiffs' identification of "all definite streams" as the subject of their trespass claim is clearly inadequate.

A. Plaintiffs Have Not Identified a Possessory Interest Sufficient to Support a Trespass Claim

Plaintiffs' response confirms that their trespass claim is based solely on their bald assertion of blanket ownership over virtually all waters in the IRW. Plaintiffs claim that definite streams, *see* SAC ¶ 119, are public waters which are state-owned, and thus Plaintiffs have a possessory interest in those streams located in the IRW sufficient to support a claim for trespass. Plaintiffs, however, have not alleged any facts, which if taken as true, would support Plaintiffs' claim of ownership.

Plaintiffs acknowledge that "water running in a definite stream . . . is subject to appropriation for the benefit and welfare of the people of the state." *See* Pls.' Resp., p. 3 (*citing* 60 OKLA. STAT. § 60(A) (Dkt. No. 1255)). Plaintiffs further acknowledge that once such water is appropriated and beneficially used by another, it is no longer state-owned. *See id.* (*citing City of Stillwater v. Oklahoma Water Resources Board*, 524 P.2d 938 (Okla. App. 1974) and *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 753 (Okla. 1969)). Despite those acknowledgments, Plaintiffs have not plead any facts showing that they actually own any definite stream in the IRW.

Plaintiffs also disingenuously distort Defendants' argument regarding the public nature of the property at issue. Defendants do not suggest they are entitled to use public property in some unlawful manner, as Plaintiffs claim. *See* Pls.' Resp. at p. 4. Defendants simply argue is that because the property at issue is open to the public, the State lacks the right to exclude necessary

to the support a common law trespass claim. Plaintiffs cite *Adderley v. Florida*, 385 U.S. 39 (1966), for the proposition that a state may enforce its general trespass statute against persons engaging in illegal activity on public property. However, *Adderley* actually supports Defendants' argument that property that is open to the public cannot be the subject of a trespass claim. In *Adderley*, a group of students was arrested for trespassing on jail property. Although the jail property was owned by the State, it was not open for public use. In fact, there was no "evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose." *Adderley*, 385 U.S. at 49. This fact was central to the Court's ruling. This fact is absent here.

Here, the waters located in the Oklahoma portion of the IRW are admittedly open to the public. It is uncontradicted that the State does not exclusively possess those waters; the State has permitted the public to use these allegedly "state-owned" waters. As a consequence, Plaintiffs do not have standing to maintain a trespass claim. Plaintiffs simply have not plead facts sufficient to show they have standing to pursue their sweeping trespass claim for all water in all definite streams in the IRW – whatever that means.

Plaintiffs understandably try to distance themselves from the Tenth Circuit's rejection of an indistinguishable trespass claim brought by the New Mexico Attorney General in *New Mexico v. General Electric*, 467 F.3d 1223 (10th Cir. 2006), *affirming New Mexico v. General Electric*, 335 F. Supp. 2d 1185 (D. N.M. 2004). Plaintiffs argue that *New Mexico* is a groundwater case that was decided under New Mexico law, and, therefore, does not apply here. However, *New Mexico* was decided based on a lack of the requisite ownership interest in the water and the public nature of the water, not on some imagined difference between surface water and groundwater. *See New Mexico*, 335 F. Supp. 2d at 1234 ("Absent the pleading of an exclusive

possessory legal interest pertaining to the groundwater in question, this court concludes that plaintiffs cannot maintain a common law cause of action for trespass.”) Plaintiffs’ trespass here fails for the same deficiency. Plaintiffs have not identified any water exclusively possessed by the State. Rather, their trespass claim rests on their generic status as trustee or sovereign over all “public water” in the IRW. *See* Pls.’ Resp. at p. 3. The *New Mexico* Court held, however, that such “public trust/*parens patriae* interests” and “stewardship” rights “fall outside the scope of the law’s protection traditionally afforded to private landowners’ right of exclusive possession by the law of trespass.” *Id.* at 1235.

Moreover, Plaintiffs are, in fact, seeking damages for trespass with respect to water flowing “under the surface” of the ground. SAC, ¶ 119 (Dkt. No. 1215). Plaintiffs attempt to limit the holding in *New Mexico* to water flowing in “definite” underground streams is sheer sophistry. Water flowing under the ground is groundwater. It is wholly irrelevant whether the stream is “definite” or “indefinite”. Simply put, a state pleading a groundwater trespass claim based on its trusteeship over such waters does not have not a sufficient possessory interest to support a common law cause of action for trespass. *See New Mexico*, 335 F. Supp. 2d at 1234-35.

Because Plaintiffs have not plead a sufficient possessory interest in the public waters which are the subject of its trespass claim, Count 6 of the SAC must be dismissed.

B. The Complaint Fails to Identify Any Specific Property Where a Physical Invasion Has Occurred

Plaintiffs argue that their identification of “the water in that portion of the Illinois River Watershed located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface”, and their conclusory assertion that “the Poultry Integrator Defendants’ waste disposal practices have resulted in an actual and

physical invasion” of Plaintiffs’ property satisfy Rule 12(b) and this Court’s June 15, 2007, order. *See* Pls.’ Resp., p. 7 (Dkt. No. 1255). As a matter of law, the trespass claim in the SAC is just as deficient as the claim in the First Amended Complaint (“FAC”) that this Court dismissed. Significantly, the factual allegations regarding the identity of properties in the amended trespass claim are no more specific than those in the trespass claim this Court dismissed. Moreover, this Court stated that if Plaintiffs chose to replead the trespass claim they must “specifically set forth those properties which they would have standing to assert a trespass claim upon.” *See* 6/15/07 Hrg. Tr., p. 176, lns. 11-13. Plaintiffs’ amended trespass claim fails to satisfy this Court’s explicit instructions.

Plaintiffs’ modified groundwater claim illustrates that there is nothing they will not say or do to avoid pleading their claim with the requisite specificity. Plaintiffs previously limited their trespass claim to groundwater flowing beneath land in the IRW that is actually owned by the State of Oklahoma. *See* Pls.’ Resp. to Motion for Judgment on the Pleadings, p. 11 (Dkt. No. 1111). Instead of identifying state-owned properties which had contaminated groundwater beneath it, however, Plaintiffs’ amended trespass claim fails, specifically to identify even one surface estate which they own and which lies above groundwater. Plaintiffs’ vague reference to definite streams “under the surface” does not satisfy Rule 12 or this Court’s June 15, 2007, Order.

Plaintiffs’ surface water trespass claim also lacks the requisite specificity. The SAC does not identify any particular stream that has been invaded; it simply makes sweeping statements about all definite streams, none of which are identified. Plaintiffs complain that they should not be required to identify by name each definite stream which is the subject of their trespass claim. Unfortunately for Plaintiffs, that is precisely what the law and this Court require. Defendants are

not required to divine the claims brought by a plaintiff. To satisfy Rule 12, a plaintiff is required specifically to identify the properties which he claims were improperly invaded and the person responsible for the invasion. Plaintiffs have not asserted that all streams in the IRW have been invaded by constituents traceable to any defendant, but they nonetheless refuse to differentiate the streams to which their trespass claim does not apply from those to which it does. Without identifying which waters have been invaded, Plaintiffs have failed to show they have standing to sue for trespass to any water. Perhaps the streams that are the subject of Plaintiffs' trespass claims are not "definite streams" at all, and, therefore, not even arguably owned by the State. *See Oklahoma Water Res. Bd. v. Central Okla. M.C. Dist.*, 464 P.2d 748, 753 (Okla. 1968) (State's rights do "not apply to private waters . . . [but] definite nonnavigable streams are public waters.") Perhaps the groundwater that Plaintiffs believe has been contaminated is beneath privately owned property, and, therefore, beyond the reach of Plaintiffs' public trust claims. *See* 60 Okla. Stat. § 60 ("The owner of the land owns water standing thereon, or flowing over or under its surface. . . .")

Rule 12 requires the assertion of the actual facts on which a plaintiff may rest a cause of action. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007) (Rule 12 does not permit "courts to conjure up unpleaded facts that might turn a frivolous claim . . . into a substantial one.") Without pleading such facts, Defendants are unfairly forced to expend time and resources defending against claims that are subject to immediate dismissal. Plaintiffs have blatantly ignored the requirements of Rule 12 and this Court's order regarding the repleading of their trespass claim. *See* 6/15/07 Hrg. Tr., p. 176, lns. 11-18. Accordingly, the trespass claim asserted in the SAC should be dismissed.

III. CONCLUSION

The allegations in the SAC's trespass claim do not satisfy the Court's June 15, 2007, Order and do not satisfy Rule 12. Plaintiffs have not alleged a possessory interest in any property sufficient to support a trespass cause of action. Further, Plaintiffs have not identified any property they own that has been invaded, and which Defendant is responsible for the invasion. Accordingly, Plaintiffs' trespass claim (Count 6) must be dismissed.

Respectfully submitted,

BY: /s/ Robert W. George

Robert W. George, OBA #18562
Michael R. Bond
Erin W. Thompson
KUTAK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Timothy K. Webster
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Stephen L. Jantzen, OBA # 16247
Patrick M. Ryan, OBA # 7864
Paula M. Buchwald, OBA # 20464
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/ James M. Graves

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

James M. Graves
Gary V. Weeks
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111
**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL & ACORD
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807
**ATTORNEYS FOR PETERSON
FARMS, INC.**

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Theresa Noble Hill, OBA #19119

John H. Tucker, OBA #9110

Colin H. Tucker, OBA #16325

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE

Post Office Box 21100

Tulsa, OK 74121-1100

Telephone: (918) 582-1173

Facsimile: (918) 592-3390

-and-

Terry W. West

THE WEST LAW FIRM

124 W. Highland

Post Office Box 698

Shawnee, OK 74802-0698

Telephone: (405) 275-0040

Facsimile: (405) 275-0052

-and-

Delmar R. Ehrich

Bruce Jones

Krisann K. Lee

FAEGRE & BENSON, LLP

2200 Wells Fargo Center

90 South 7th Street

Minneapolis, MN 55402

Telephone: (612) 766-7000

Facsimile: (612) 766-1600

**ATTORNEYS FOR CARGILL, INC., and
CARGILL TURKEY PRODUCTION, LLC**

BY: /s/ R. Thomas Lay

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

R. Thomas Lay, OBA #5297

KERR, IRVINE, RHODES & ABLES

201 Robert S. Kerr Ave., Suite 600

Oklahoma City, OK 73102

Telephone: (405) 272-9221

Facsimile: (405) 236-3121

-and-

Jennifer s. Griffin
LATHROP & GAGE, L.C.
314 East High Street
Jefferson City, MO 65101
Telephone: (573) 893-4336
Facsimile: (573) 893-5398
**ATTORNEYS FOR WILLOW BROOK
FOODS, INC.**

BY: /s/ John R. Elrod
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
CONNER & WINTERS, L.L.P.
1 Williams Center, Room 4000
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8547
**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Robert P. Redemann, OBA #7454

Lawrence W. Zeringue, OBA #9996

David C. Senger, OBA #18830

PERRINE, MCGIVERN, REDEMANN, REID,
BERRY & TAYLOR, P.L.L.C.

Post Office Box 1710

Tulsa, OK 74101-1710

Telephone: (918) 382-1400

Facsimile: (918) 382-1499

-and-

Robert E. Sanders

Stephen Williams

YOUNG WILLIAMS P.A.

Post Office Box 23059

Jackson, MS 39225-3059

Telephone: (601) 948-6100

Facsimile: (601) 355-6136

**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

CERTIFICATE OF SERVICE

I certify that on the 3rd day of October 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General
J. Trevor Hammons, Assistant Attorney General
Tina L. Izadi, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us
trevor_hammons@oag.state.ok.us
tina_izadi@oag.state.ok.us

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
Joseph P. Lennart
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug_wilson@riggsabney.com
driggs@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
jlennart@riggsabney.com

J. Randall Miller
Louis W. Bullock
MILLER KEFFER BULLOCK PEDIGO LLC

rmiller@mkblaw.net
lbullock@bullock-blakemore.com

David P. Page
BELL LEGAL GROUP

dpage@edbelllaw.com

Frederick C. Baker
Lee M. Heath
William H. Narwold
Elizabeth C. Ward
Elizabeth Claire Xidis
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
MOTLEY RICE, LLC

fbaker@motleyrice.com
lheath@motleyrice.com
bnarwold@motleyrice.com
lward@motleyrice.com
cxidis@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrousseau@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

A. Scott McDaniel
Nicole Longwell
Philip D. Hixon
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

David G. Brown
Jennifer S. Griffin
LATHROP & GAGE, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

dbrown@lathropgage.com
jgriffin@lathropgage.com

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
YOUNG WILLIAMS P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

George W. Owens
Randall E. Rose
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
BASSETT LAW FIRM
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com

John R. Elrod
Vicki Bronson
Bruce W. Freeman
D. Richard Funk
P. Joshua Wisley
CONNER & WINTERS, PLLC
COUNSEL FOR SIMMONS FOODS, INC.

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
dfunk@cwlaw.com
jwisley@cwlaw.com

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtuckercourts@rhodesokla.com
chtucker@rhodesokla.com
thillcourts@rhodesokla.com

Terry W. West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Dara D. Mann
FAEGRE & BENSON LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

dehrich@faegre.com
bjones@faegre.com
kklee@faegre.com
dmann@faegre.com

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

/s/ Robert W. George
Robert W. George